*Lai v The Queen* [2003] NTCCA 12

| | |
|---|---|
| PARTIES: | QUO CHENG LAI |
| | v |
| | THE QUEEN |
| TITLE OF COURT: | COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | CA 4 of 2001 (9909126) |
| DELIVERED: | 14 November 2003 |
| HEARING DATES: | 6 November 2003 |
| JUDGMENT OF: | ANGEL ACJ, RILEY J AND PRIESTLEY AJ |

**CATCHWORDS:**

CRIMINAL LAW – APPEAL – Conviction for murder – Whether trial judge erred in admitting into evidence a statement by the appellant to police – Whether statement inadmissible due to s142 Police Administration Act – Whether the appellant was a "suspect" at the time of making the statement – Appeal dismissed

Evidence Act, s 26L

Police Administration Act, ss 142, 143

*R v O'Donohue* (1987-1988) 34 A Crim R 397 at 401, followed
*Rostron v The Queen* (1991-1992) 1 NTLR 191 at 196, followed
*Grimley v The Queen* (1994-1995) 121 FLR 282 at 294, followed
*Moussa v The Queen* (2001) 125 A Crim R 505, followed
*R v Maratabanga* (1993) 3 NTLR 77, considered
*R v Grimley* (1994) 121 FLR 236, applied
*R v Raso* (1993) 115 FLR 319, referred to
*R v Heaney* (1992) 2 VR 531 at 547-548, referred to

*Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303, referred to
*R v Emily Jako* (1999) NTSC 46, referred to
R *v Mellors* (2000) NTSC 41, referred to

**REPRESENTATION:**

*Counsel:*

| | |
|---|---|
| Appellant: | P. Elliott |
| Respondent: | R. Wild QC with W.J. Karczewski QC |

*Solicitors:*

| | |
|---|---|
| Appellant: | Northern Territory Legal Aid Commission |
| Respondent: | Office of the Director of Public Prosecutions |

| | |
|---|---|
| Judgment category classification: | A |
| Judgment ID Number: | ril0329 |
| Number of pages: | 13 |

ril0329

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Lai v The Queen* [2003] NTCCA 12
No. CA 4 of 2001 (9909126)

BETWEEN:

**QUO CHENG LAI**
Appellant

AND:

**THE QUEEN**
Respondent

CORAM: ANGEL ACJ, RILEY J AND PRIESTLEY AJ

REASONS FOR JUDGMENT

(Delivered 14 November 2003)

**THE COURT:**

[1] On 14 February 2001, following an 8-day trial, the appellant was convicted of having murdered his wife on 24 April 1999.

[2] The prosecution case against the appellant included a statement made by the appellant to Senior Constable Bennett on the morning of 25 April 1999. In a pretrial hearing the appellant unsuccessfully sought to have the statement excluded from evidence. He now appeals against his conviction on the basis that the trial judge erred in allowing the admission of the statement into evidence as part of the prosecution case.

**THE CROWN CASE**

[3] The appellant and the deceased were married in 1981. They moved to Darwin in 1982 and from 1983 they together conducted the business of the Ebony Coffee Lounge at a suburban shopping centre. The marriage broke down when the deceased entered into a relationship with Risal Ongkosaputra in 1998. At the time of her death the deceased was living apart from the appellant. The deceased was living at 35 Clarence Street, Woodleigh Gardens, and the appellant a short distance away at 17 Coburg Drive, Leanyer. Two of the four children of the relationship were living in Darwin. They resided with their mother from Monday to Friday and with their father over the weekend.

[4] The Crown alleged that in November 1998 the appellant learnt that the deceased had travelled to Singapore to be with Mr Ongkosaputra and he had telephoned their hotel, threatening to kill both his wife and Mr Ongkosaputra. On 18 November 1998 the deceased obtained an order under the Domestic Violence Act which included terms that the appellant was not to contact or approach the deceased either directly or indirectly.

[5] On the evening of her death the deceased worked at the coffee shop until 9.50 pm. The Crown case was that when she returned home the appellant was waiting in her house. He had gained entry by using a brick to break a glass panel in a rear door. In so doing he cut his fingers and left blood on the glass and on the brick. He used a broom and dustpan to sweep up the

broken glass which was inside the house and he placed it outside the door. In so doing he left blood on the broom and on the pan.

[6] The Crown case was that the appellant used a television video cable to strangle his wife to death.

[7] The police investigation revealed a number of matters which indicated that the appellant had been present at the home of his wife that night. These included the presence of the appellant's blood on the glass, brick, broom handle and dustpan. His blood was also found on a T-shirt worn by the deceased. In addition, he took from the deceased a gold necklace which she had been wearing. In taking the necklace the clasp was broken and police later found the clasp near the body of the deceased. The remainder of the necklace was subsequently located in a clutch-bag secreted between mattresses of an ensemble in the main bedroom of the appellant's house.

[8] The Crown case was that after killing his wife the appellant walked from Clarence Street to his home in Coburg Drive where he had left his two children watching videos. He took the children to a fast-food establishment and, during the trip, told his 10-year old daughter that if anyone asked whether he had been out that day she should say that he had been at home.

[9] Police were alerted to the death of the deceased by Mr Ongkosaputra. They were immediately concerned as to the safety of the children and went to the appellant's home. This was at about 12.30 am on the morning of 25 April 1999. The police did not inform the appellant of the death of his wife, but

rather said there had been a domestic incident and they were concerned for the welfare of the children. The appellant gave the impression of knowing nothing of his wife's death. He asked of police whether something terrible had happened and suggested, if it had, Mr Ongkosaputra might be responsible.

[10] Arrangements were made for the care of the children and the appellant then voluntarily accompanied police to the Berrimah Police Headquarters. They arrived there at about 1.10 am. Upon arrival the appellant was taken to an interview room which was not equipped with electronic recording apparatus. There was a discussion between the appellant and Detectives Lade and Bennett in which the appellant mentioned the existence of the domestic violence restraining order. Then, at about 1.25 am, Detective Lade advised the appellant of the death of his wife. The appellant broke down and became very upset. When he had regained his composure the appellant described his movements the previous night. His description did not include him visiting the Clarence Street address and he said that he had not seen his wife since they had both been in the Family Court some time before. Detective Lade requested that Detective Bennett obtain a written statement from the appellant and Detective Lade went off to ensure that other witnesses were being attended to. Detective Lade himself commenced taking a statement from one of the witnesses present at the police station.

[11] The interview with the appellant took place by Detective Bennett asking the appellant a series of questions and noting down the answers. He then took

his handwritten notes and created the witness statement on his computer. The detective followed procedures commonly adopted in the taking of a witness statement rather than those relevant to an interview with a suspect. The statement was not electronically recorded. There was no second officer present to corroborate the interviewing officer. No warnings were given. The statement was in the form of a statutory declaration. By reference to the computer it was known that the document had been saved at 3.10 am. It took some hours to produce. Once the statement had been created, Detective Bennett read it back to the appellant (who could not read English "very well") and then both signed and dated the document. The signed statement was handed to Detective Lade at around 4.30 am to 5 am that morning.

[12] The statement taken from the appellant by Detective Bennett was the subject of the application made pursuant to s 26L of the Evidence Act and of this appeal. The statement was described by the learned trial judge as follows:

> "The statement on its face is entirely self-serving and exculpatory. The Crown sought to adduce the statement as part of its case against the accused on the basis that, in the light of other evidence, the statement amounted to an implied admission or a statement against interest. In particular, the Crown's case was that parts of the statement concerning when the accused last met the deceased and last visited 35 Clarence Street were deliberate and material lies motivated by a realisation of his guilt and a fear of telling the truth."

**SECTION 142**

[13] Before the learned trial judge the appellant put forward various bases upon which it was submitted the statement should have been excluded. The only

basis for exclusion pressed on appeal was that the statement was inadmissible under s 142 of the Police Administration Act because of the failure of the police to electronically record the appellant confirming the substance of the statement. Section 142 provides that a confession or admission is not admissible unless the questioning was electronically recorded or was subsequently confirmed by the person and the confirmation was electronically recorded.

[14] The terms of s 142(1) and 143 of the Police Administration Act are as follows:

> "142(1): Subject to section 143, evidence of a confession or admission made to a member of the Police Force by a person suspected of having committed a relevant offence is not admissible as part of the prosecution case in proceedings for a relevant offence unless –
>
> (a) where the confession or admission was made before the commencement of questioning, the substance of the confession or admission was confirmed by the person and the confirmation was electronically recorded; or
>
> (b) where the confession or admission was made during questioning, the questioning and anything said by the person was electronically recorded,
>
> and the electronic recording is available to be tendered in evidence.
>
> 143: A court may admit evidence to which this Division applies even if the requirements of this Division have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the circumstances of the case,

admission of the evidence would not be contrary to the interests of justice."

[15] In this case there is no dispute that the statement taken from the appellant was not electronically recorded. When the appellant was subsequently invited to take part in an electronically recorded interview he declined to do so and the opportunity to put the contents of the statement to him again was not available.

[16] The issue on the voir dire and again before this Court was whether, at the time the statement was made, the appellant was "a person suspected of having committed a relevant offence" for the purposes of the section.

[17] Although the statement did not contain any overt confession or admission, the parties at trial acted on the basis that s 142 of the Police Administration Act, subject to the question whether the appellant was a "suspect", had application to it. The material contained false denials and the Crown relied upon those false denials as constituting "deliberate and material lies motivated by a realisation of his guilt and a fear of telling the truth". The Director of Public Prosecutions, who appeared on behalf of the respondent, said that the Crown did not wish to depart in the appeal from the position taken at the trial that the provisions of s 142 applied in such circumstances.

[18] The learned trial judge found that the appellant was not a "suspect" at the time of the taking of the statement by Detective Bennett. Although not

expressly stated, it follows from his Honour's reasoning that the appellant was not a "suspect" at the time that he signed the statement.

[19] For the appellant to succeed on this appeal he must show that there was no evidence to support the challenged findings made by the learned trial judge or that the evidence in relation to those findings was all one way. The Court of Criminal Appeal has no power to substitute its own findings for those of the trial judge: *R v O'Donohue* (1987-1988) 34 A Crim R 397 at 401; *Roston v The Queen* (1991-1992) 1 NTLR 191 at 196; *Grimley v The Queen* (1994-1995) 121 FLR 282 at 294; *Moussa v The Queen* (2001) 125 A Crim R 505.

[20] The application of s 142 of the Police Administration Act has been addressed in two Northern Territory cases. In *R v Maratabanga* (1993) 3 NTLR 77 Mildren J noted that "the person who must hold the relevant suspicion is, the police officer, or if there is more than one officer present when the admission or confession is made, by at least one of the police officers present at that time". That conclusion is not challenged in this appeal. His Honour went on to say:

> "The difficulty is that suspicion is a state of mind which can vary considerably. The suspicion may be very slight or it may be very strong, or it may be somewhere in between; it may be reasonable or unreasonable; it may be based on some facts which might be evidence in a trial, or it may be based on nothing more than intuition or instinct. But, in my opinion, the kind of suspicion required must be such as to engender a belief, whether reasonable or not, and whether or not proof is lacking, in the mind of the police officer that the person being questioned is probably guilty of the relevant offence."

[21] The section was again considered in *R v Grimley* (1994) 121 FLR 236. In that case Kearney J noted that suspicion is much less than belief and agreed generally with the observations of Mildren J in *R v Maratabanga*. However, his Honour went on to say:

> "With respect, while I agree with the passage emphasised, I do not consider that to suspect the person he is questioning, in terms of s 142(1), the police officer must at that time believe that he is probably guilty of the offence. Suspicion in general lies somewhere between mere speculation that the person committed the offence, without any factual foundation – a mere idle wondering – and a belief based on reasonable grounds that he committed it. It is a state of mind which arises from a consideration of known facts less than those required for a belief, resulting in an apprehension that the person might possibly have committed the offence. It requires a degree of conviction which is beyond mere speculation, and based upon some factual foundation."

[22] In our view the approach adopted by Kearney J is correct in preferring the use of the word "possibly" rather than "probably" which may suggest a greater degree of certainty than is necessary to afford the person the protection of the provision. We note that the approach of Kearney J is similar to that adopted by Ormiston J in *R v Raso* (1993) 115 FLR 319 at 348-350 and by the Court of Criminal Appeal in relation to a similar but different provision in *R v Heaney* (1992) 2 VR 531 at 547-548. See also *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303. It has been applied in the Northern Territory by Mildren J in *R v Emily Jako* (1999) NTSC 46 and by Thomas J in *R v Mellors* (2000) NTSC 41. In the present case Bailey J referred to both *R v Maratabanga* and *R v Grimley* and was

satisfied that Detective Bennett did not consider the appellant a suspect under either approach. It cannot be said that his Honour erred in this regard.

[23] The statement to which exception was taken was obtained by Detective Bennett at the direction of Detective Lade. Both detectives gave evidence on the voir dire. Having heard that evidence and considered the evidence of other prosecution witness, along with the evidence of the appellant, the learned trial judge declared himself satisfied that the appellant was not a "suspect" until around 5 am on 25 April 1999 – that is after he had completed and signed his statement. At about that time Detective Lade reviewed the information available to him. As part of the evaluation he conferred with Detective Nixon who was the acting officer in charge of the CIB. During his discussion with Detective Nixon, Detective Lade noted down 7 points and, at the conclusion of the discussion, it was agreed that there were sufficient grounds to arrest the appellant. He was arrested for the murder of his wife at 5.08 am on 25 April 1999. The effect of the evidence of Detective Lade is that he concluded that the appellant was a suspect and also that reasonable grounds existed to arrest him, at the same time. This had been the earliest opportunity for him to evaluate the material obtained over the course of the investigation and his conclusion was reached following that process being undertaken.

[24] It was the submission of the appellant that the information available to Detective Lade and through him to Detective Bennett was such that the appellant "must have been a suspect" when the statement was being obtained

and especially when it was ultimately signed. Reference was made to the existence of the restraining order and the presence of cuts on the fingers of the appellant.

[25] Prior to the commencement of the statement it was known by the detectives that the deceased had taken out a domestic violence order against her husband. That information was provided by the appellant in preliminary discussions. The attitude of Detective Bennett to that information was:

> "Mr Lai was certainly a person that needed to be spoken to. Certainly my years as a police officer and experience tells me that there are many, many people out there who have domestic violence orders who separate, who threaten each other and nothing takes place. His may well have been exactly that case."

It was not until the early hours of the morning (about 2.42 am) that Detective Lade checked the computerised court records and confirmed the order had been made.

[26] It was known to the detectives that there was broken glass and blood at the premises of the victim. It was also known to them that the appellant had small cuts on his fingers. Detective Bennett gave evidence that he had asked the appellant about the cuts and was told that they had been received whilst the appellant was doing some gardening. Detective Lade, in describing the process of undertaking his review, said that: "the last point that I had noted was the accused had – had what appeared to be recent injuries on his fingers and then I – small cuts on his fingers. And then I associated with what had been pointed out to me at the victim's house".

When they first observed the injuries to the appellant's fingers there was no reason why Detective Lade or Detective Bennett should have immediately associated the cuts with the broken glass door. The notes taken by Detective Lade of the initial conversation at which the cuts were mentioned does not include any reference to the cuts, indicating that they were not then regarded as being of significance. It appears that it was only at the time of the review that the potential significance became apparent.

[27] A consideration of the evidence reveals that information was coming in to Detective Lade throughout the early morning of 25 April 1999. Some of that information was coming in during the period that Detective Bennett was taking the statement from the appellant. Detective Bennett did not receive additional information whilst he was taking the statement from the appellant.

[28] The making of threats to kill by the appellant against his wife and Mr Ongkosaputra was not known by Detective Lade until he received the statement of Mr Ongkosaputra. Although no times are provided, that statement was taken by Detective Nicholson some time in the early morning and was read by Detective Lade "at some stage later in the morning". Further, information that a witness had seen an Asian male run from the front of 35 Clarence Street to the footpath and walk towards Castlereagh Drive whilst acting in a suspicious manner did not become known to Detective Lade until he received the statement of the witness Jan Forrest. The statements of both Jan Forrest and Mr Ongkosaputra were taken by

detectives other than Detectives Lade and Bennett and were taken in the early hours of the morning of 25 April 1999. They were assessed at the time of the evaluation undertaken by Detective Lade. There is no suggestion that the information in those statements was known to Detective Bennett when he conducted the interview with the appellant or when the statement was signed.

[29] The learned trial judge made an assessment of the witnesses called on the voir dire. In relation to the prosecution witnesses he concluded that they were "both accurate and honest in their evidence". He went on to conclude:

> "I am also satisfied on the basis of the evidence of Lade and Bennett, together with the other prosecution witnesses, that the accused was not a 'suspect' until around 5 am on Sunday 25 April. I accept as true the evidence of Lade that it was not until he sat down between 4.30 am and 5 am to consider the progress of the investigation that he formed the subjective belief that the accused was 'probably' (*R v Maratabanga* (1993) 3 NTLR 77 at 86 per Mildren J) or 'possibly' (*R v Grimley* (1994) 121 FLR 236 at 258 per Kearney J) guilty of murdering his wife. Similarly, I accept as true Bennett's evidence that he did not consider the accused to be a 'suspect' during the taking of the statement".

[30] Contrary to the submission of the appellant, the evidence in relation to the findings of his Honour was not all one way. There was a clear evidentiary basis for his Honour to reach the conclusions that he did reach. No error in his approach has been identified. The appeal is dismissed.

———————————————————